PP

v.

LOO SENG YIP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-46-2001]
25 OCTOBER 2004

CRIMINAL LAW: *Penal Code - Section 302 - Murder - End of prosecution case - DNA evidence wanting in material particulars - Whether of no value - Accused assaulted prior to making cautioned statement - Whether statement inadmissible - Whether no material to link accused to murder - Whether no prima facie case made out*

EVIDENCE: *Expert evidence - DNA profiling - Expert not giving reasons for analysis undertaken - No explanation on DNA comparisons and calculations of random occurrence ratio - Whether evidence vitiated - Whether of no value - Evidence Act 1950 s. 51*

The prosecution, in seeking to prove the charge of murder against the accused, had adduced evidence that the DNA profile of the accused matched the DNA profile developed from blood stains found near the crime scene, and further, that the accused, in his cautioned statement, had admitted to the offence charged. The facts showed however that the chemist ('PW20'), when testifying on the DNA analysis he undertook, did not give any explanation as to the nature of the match, or as to how he had arrived at the random occurrence ratio in question. The facts further showed that, following a trial within a trial to ascertain the admissibility of the cautioned statement, evidence was adduced, which was not rebutted, that the accused had been assaulted prior to his giving the cautioned statement to PW23. The prosecution had also not accounted for the where-about of the accused on certain dates when he was in their custody, and this being the case, before the learned judge herein, at the end of the prosecution case, questions arose as to: (i) whether the absence of an explanation as to the process by which PW20 had arrived at his conclusions was fatal, and had deprived his testimony of evidentiary value; (ii) whether the cautioned statement was admissible in evidence; and (iii) whether a *prima facie* case of murder under s. 302 Penal Code had been made out against the accused.

Held (acquitting and discharging the accused):

[1] An expert must give reasons for his conclusions. In the case of DNA evidence, it is the number of matches and their DNA characteristics that will explain the relationship between the samples analysed. The number of matches will also facilitate a calculation of the random occurrence ratio. These will constitute the reasons for the conclusion arrived at by the chemist. (p 505 f-g)

[2] PW20 had merely given evidence that the DNA profile of the accused matched with the profile of the blood stains on A4, thereby showing that the DNA identified were consistent with having originated from the same source. He did not however explain the nature of the DNA characteristics and the number of matches that were similar. Neither did he explain on his finding that the probability of a randomly selected unrelated individuals having such matching DNA profile, based on the Malaysian Chinese population database, was approximately one in 14 billion. PW20, therefore, had given evidence only of his conclusions without adverting to the reasons thereof. PW20's evidence, thus, had no evidential value. Further, the fact that the required evidence was available in the chemist report made no difference to the evidence. (pp 505 h & 506 a)

[3] As to what happened to the accused between 6 January 2001 and 8 January 2001, the prosecution ought to have been aware that such evidence formed a vital part of its case in a trial within a trial. In any case, the evidence that the prosecution was seeking to adduce to fill the gap was not of a technical or formal nature. The prosecution's attempt to recall the investigating officer to fill the gap, therefore, must be rebuffed, with the result that there was a gap in the prosecution evidence as to what happened to the accused during the said period when he was in custody prior to making the cautioned statement. (p 511 a-d)

[3a] The evidence of the accused that he was assaulted after his arrest was supported by the evidence of TW2 who saw bruises on the accused. In the circumstances, the cautioned statement could not have been voluntarily made and it was not admissible in evidence. (p 511 d-g)

[4] With the adverse rulings aforesaid, there was no evidence to connect the accused to the killing of the deceased. The DNA evidence, at most, only showed that the accused was near the scene. Likewise, the throwing of the clothes by the accused and the injury on his leg did not, on their own, establish anything. No *prima facie* case had thus been made out against the accused. (p 511 h)

[Accused acquitted and discharged without his defence being called].

Case(s) referred to:
Alan James Doheny Gary Adams v. R [1997] 1 Cr App R 369 ***(refd)***
Director of Public Prosecutions v. Hester [1973] AC 296 ***(refd)***
Lim Sing Hiaw v. PP [1965] 1 MLJ 85 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Chia Leong Foo [2000] 6 MLJ 705 ***(refd)***
PP v. Tan Boon Tat [1990] 2 MLJ 466 HC ***(refd)***
Sim Ah Song v. R [1951] MLJ 150 ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 51
Penal Code, s. 302

For the prosecution - Anna Ng Fui Choo DPP
For the accused - Gooi Soon Seng; M/s Gooi & Azura

Reported by WA Sharif

JUDGMENT

Augustine Paul J:
In this case the accused was charged with an offence of murder. The charge reads as follows:

> Bahawa kamu pada 27hb Disember 2000 jam di antara 11.45 malam hingga 1.30 pagi 28hb Disember 2000 di depan rumah No. 3E, Pearl Tower, OG Heights, Jalan Awan Cina, di dalam Daerah Brickfields, di dalam Wilayah Persekutuan, Kuala Lumpur, melakukan pembunuhan dengan menyebabkan kematian kepada seorang lelaki Cina yang bernama Teoh Boon Teik, KPT: 591225-08-6181 dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

The accused claimed trial to the charge. The prosecution called a total of 26 witnesses in support of its case. Deva Krishnan a/l Murugiah (PW4) is the manager of Syarikat Reza Sekuriti which provided security services to OG

Heights Condominum. On 27 December 2000 he was informed by his supervisor that a male Chinese was lying in front of Door E, 3rd Floor, Pearl Tower, OG Heights Condominium with blood on the floor. While on the way to the scene he informed University Hospital and the police of the incident. On arrival at the security office at the scene he saw Chong Hon Loong (PW6) lying down in front of the office. PW6 was unconscious and smelling of alcohol. Together with PW6 there were four persons there one of whom was a female. PW6 then proceeded to the scene. There he found David Teoh Boon Teik ("the deceased") lying on the floor. He checked the deceased and found that he was not breathing. PW4 said that PW6 was a regular visitor to the condominium and had been registered by the deceased as a permanent visitor. He also said that the accused came there often with the deceased. Chief Inspector Koh Fei Cheow (PW26) was the investigation officer in this case. He went to the scene with a team of police officers. On arrival there he met PW6. He then said:

> After that Mr Deva took me to the scene of the crime. From the ground floor to the 3rd floor we took a lift. When we came out of the lift and turned left I found a body. The body was in front of condominium no 3E, Tingkat 3, Pearl Tower, OG Heights, No 60, Jalan Awan Cina, Kuala Lumpur. After that I was told by Mr Deva that the deceased is a resident of that condominium. I then checked the lock of the door of that condominium. There was no forced opening of the door. Then I checked the body. There were no documents or house keys on the body. I found a lot of injuries on the body. At that time I did not know who the deceased was.
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> I then opened the door of the condominium by force. There was no sign of ransacking inside the condominium. Everything was neat. After that I got the particulars of the deceased from documents which I found in the house. Mr Deva told me that the deceased was the occupant of the condominium. Mr Deva called the deceased as Mr David Teoh. After checking the house I drew a sketch plan and asked the photographer to take photographs. The photographer took photographs. I can identify them. (P3 A – W dirujuk kepada saksi) These are the photographs.
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> At the scene I collected blood samples of the deceased. I took the samples from under the body of the deceased. I took another blood sample from the right trousers pocket of the deceased. The third sample was from the left calf of the deceased. After that I found blood stains on the emergency exit door of the condominium. This door is near the body. I got down through the staircase to the ground floor. At the ground floor I saw blood stains on the toilet door. I took a sample of the blood from the door. So I had taken 4 samples. I labelled as A1 the sample under the body of deceased; as A2 the sample from the right pocket; as A3 sample from the calf and as A4 from the door.

(Saksi dirujuk kepada P3) I drew a key for the photographs. (Key shown to witness) This is the key – marked as P3KK. The emergency door is at P3A. The place from where A4 was taken is at P3C. The place where A1 is taken is at P3C. The place where A2 was taken is shown in P3F and A3 in P3I.

PW26 then instructed one of his officers to escort the body of the deceased to Hospital Kuala Lumpur. He then said:

On 5.1.2001 at about 11.05 pagi saya telah keluarkan OKT untuk interview. Dalam interview at about 11.15 pagi I read the caution to the OKT sebelum dia mendedahkan maklumat tentang kes ini. Selepas baca dan menerangkan amaran saya buat satu polis report – no Tun HS Lee Report 348/2001. OKT telah revealkan tempat di mana dibuang barang kes. Atas maklumat yang didedahkan oleh OKT saya mula mengesan dan cari barang kes yang dibuang di tempat yang disebutkan oleh OKT. At about 12.30 p.m. I with my team and photographer left the office to look for the exhibits. At about 12.50 p.m. we reached the Jalan Kenanga simpang, Kuala Lumpur. The brother of Chong Hon Loon was waiting there. His name is Chong Hon Meng. This person passed to me a white Proton Satria with no WGL 8117. After I received the vehicle I asked Kpl Jalil to drive the car back to the IPK. After that we proceeded to Jalan Ceylon to look for the deceased's handphone. The time was 1.05 p.m. After we failed to find it we proceeded to Kawasan Lombong terbiar (disused mine) called Kolam Ampang Hilir. At about 2.30 p.m. the diver L/Kpl Tan went to the lake to look for the exhibit. At the same time at about 2.45 I recovered 5 pairs of stockings di tepi kolam which was shown by the OKT. After that the diver found one pair of jeans warna biru bernama Gucci; a black colour T-shirt with brand Mizuno. These 2 items were found about 5 metres from the edge of the kolam. I can identify the 3 items. (Saksi dirujuk kepada P20) These are the 5 pairs of stockings. (Saksi dirujuk kepada P20 (O)) This is the pair of jeans. (Saksi dirujuk kepada P20 (M)) This is the black T-shirt. We ended the operation at about 4.00 p.m.

With regard to the taking of blood samples of the accused PW26 said:

On 8.1.2001 at about 2.15 p.m. my men and I took the accused to Hospital Kuala Lumpur for taking samples of his blood or hair for DNA sampling. At about 2.50 p.m. Dr Chung Yew Ping examined the injury of accused. After that the doctor was escorted by medical assistant Mohd Rafie to take the blood sample. It was taken. The bottle was sealed by the medical assistant. I brought it back to my office and kept it in my office. It was properly labelled. (Saksi dirujuk kepada P13) Two items were handed to me i.e. blood sample and hair of accused. The blood sample was labelled B and hair as C. At about 4.00 p.m. I took the accused to see Dr Mohd Shah to examine the injuries on him.

In cross-examination PW26 said:

> I arrested Chong Hon Loong. I found out the relationship between him the deceased. They are boyfriend and girlfriend. They are homosexual lovers. I do not know about the sexual relationship of Chong Hon Loong with others. I do not know whether he had a lover called Fei Loong. I do not know that before I arrived at the scene Chong Hon Loong attempted suicide. I took the statement of Wong Yoon Seong. He was one of the 5 persons there. He did not tell me about Chong Hon Loong attempting to jump out of the window. Chong Hon Loong was detained for 8 days. I did not investigate about the brothers of accused. I took accused's blood sample on 8.1.2001. Then I kept them in the fridge which is not locked. Other I.O.s also used it. I forgot to send these samples with the first batch of exhibits which were sent on 14.3.2001.
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> I recovered socks, jeans and T-shirt at the Kolam Ampang. I did not ask the accused to try them. I do not know the size of jeans accused wears. The diver took about 1 hour to locate them. The accused was detained for 2 days before being taken to the kolam.

Dr Mohd Shah bin Mahmood (PW12) conducted the post-mortem on the deceased. He found 26 stab wounds on the deceased. He also examined the injuries on the accused and found that they were about two weeks old. Blood and hair samples of the accused were also taken. The hair sample was marked as exh. B while the blood sample was marked as exh. C.

The blood samples that were collected from the scene and exhs. B and C were sent to the Chemistry Department for analysis which was conducted by Lim Kong Boon (PW20). PW20 said that the result of his analysis is that the DNA profile of specimen C labelled Loo Seng Yip matched with the DNA profile developed from the blood stains on A4. It will be recalled that the blood stains on A4 is from the toilet door at the ground floor. As PW20 said in his evidence:

> I examined the contents of B and C. I carried out a DNA analysis on the specimen marked C but not on specimen B. I then sealed the exhibits Jabatan Kimia Petaling Jaya 1 and handed them to L/Kpl 109435 Sazali Ahmad Zaini at 11.35 a.m. on 26.9.2001. I can identify Sazali – identified. The result of my analysis of C is that the DNA profile of specimen C labelled Loo Seng Yip obtained matched with the DNA profile developed from the blood stains on A4 related to the case (PJ) FOR 1801/01-0 and police report no Petaling 15901/2000, showing that the DNA identified were consistent with having originated from the same source. The probability of a randomly selected unrelated individuals having this matching DNA profile is approximately 1 in 14 billion as calculated based on the Malaysian Chinese population data base. The blood specimen in C was in good condition. I prepared a report. (Report shown to witness) This is my report – marked as P24.

a DNA stands for Deoxyribonucleic acid. It is the genetic material that is found within the nucleous of the cells. It is sometimes known as blue print for the development of all of us. The DNA molecule makes up the chromosomes. In the normal human being there are 46 chromosomes or 23 pairs. Of the 23 pairs 22 of them are known as the autosomes and the remaining pair is known as the sex chromosomes. For the female it has one pair of X chromosomes as her sex

b chromosome. For the male it has one X chromosome and one Y chromosome as his sex chromosome. Half of the 46 chromosomes, that is one from each pair, from an individual is inherited from his or her biological mother. The remaining 32 chromosomes is inherited from his or her biological father. Various biological samples such as blood, blood stains, semen, semen stain, hairs, bone and bone

c marrow, tissues from various parts of the body from the same individual contain identical copies of DNA. No two persons even between 2 brothers or 2 sisters have identical 46 chromosomes except identical twins. Forensic DNA analysis is a technique where analysis is carried out on a number of genetic loci on a person's chromosomes. Result from these genetic loci analysed will constitute the DNA profile of a person. Increase in the number of genetic loci analysed

d will increase the uniqueness of the DNA profile obtained. Therefore forensic DNA analysis is used in the identification of questioned biological samples, that is, if the DNA profile obtained from questioned biological samples such as blood stains match or are similar to that developed from reference biological sample then it shows that the questioned sample and the reference sample have originated from the same source. However, if the DNA profile developed from questioned

e samples did not match or is different from that developed from reference sample then it shows that the questioned samples and the reference sample have originated from different sources.

In this case the technique I used is known as the polymerace chain reaction technique on short tandem repeat genetic loci. The steps involved are as follows.

f DNA is extracted from questioned material, in the case, blood stain on A4 and not clippings marked A5 and A7. Similarly DNA are extracted from reference samples, in this case, blood specimen marked A8 and C. The amount of DNA extracted from both the questioned samples and reference blood samples were quantitated. Then 1 – 2 nenogram of the extracted DNA from each sample were amplified separately in an instrument known as the Thermal Cycler.

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Then the amplified products are analysed in an instrument known as the genetic analyser. The DNA result appears as peaks at each genetic loci in the eletropherogram. The peaks are identified by a number referring to the number of repeats in the particular area.

h When I do not complete analysis on a particular day the blood sample will be kept in our chest freezer at - 20 C. The chest freezer is under lock and key. The PCR technique I used is recognised internationally. It is used by most forensic laboratories around the world.

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I shall pause for a moment and consider the nature of DNA evidence. In dealing with such evidence I can do no better than refer to *Alan James Doheny Gary Adams v. R* [1997] 1 Cr App R 369 where Lord Justice Phillips said:

> Deoxyribonucleic acid, or DNA, consists of long ribbon-like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes – 23 provided from the mother and 23 from the father at conception, form the genetic blue print of the body. Different sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succinctly than did Lord Taylor CJ in the case of Deen (transcript: 21st December 1993), so we shall gratefully adopt his description.
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> > The process of DNA profiling starts with DNA being extracted from the crime stains and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample UDA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not.
>
> Even if a number of bands correspond exactly, any discrepancy between the profiles, unless satisfactorily explained, will show a mis-match and will exclude the suspect from complicity. Thus the first stage in seeking to prove identify by DNA profiling is to achieve a match.
>
> The characteristics of an individual band of DNA will not be unique. The fact that the identical characteristic of a single band are to be found in the crime stain and the sample from the suspect does not prove that both have originated from the same source. Other persons will also have that identical band as part of their genetic make-up. Empirical research enables the analyst to predict the statistical likelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups 'the random occurrence ratio'.

> As one builds up a combination of bands, the random occurrence ratio becomes increasingly more remote, by geometrical progression. Thus if two bands, each of which appear in 1 in 4 of the population are combined, the combination will appear in 1 in 16 of the population, and if to these are added a further band that is found in 1 in 4 of the population, the resultant combination will appear in 1 in 64 of the population. This process of multiplication is valid on the premise that each band is statistically independent from the others.

In dealing with the nature of the evidence that a DNA expert must give in Court his Lordship said:

> Mr Alistair Webster QC, on behalf of Doheny, has made the following suggestions as to the procedure which should be followed in relation to DNA evidence:
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> 1. The scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio.
>
> 2. Whenever such evidence is to be adduced, the Crown should serve upon the Defendant details as to how the calculations have been carried out which are sufficient for the defence to scrutinise the basis of calculation.
>
> 3. The Forensic Science Service ('FSS') should make available to a defence expert, if requested, the databases upon which the calculations have been based.
>
> It seems to us that these suggestions are sound, and we would endorse them. We would add that it is important that any issue of expert evidence should be identified and, if possible, resolved before trial and this area should be explored by the Court in the pre-trial review.
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> When the scientist gives evidence it is important that he should not overstep the line which separates his province from that of the jury. He will properly explain to the Jury the nature of the match ('the matching DNA characteristics') between the DNA in the crime stain and the DNA in the blood sample taken from the Defendant. He will properly, on the basis of empirical statistical data, give the Jury the random occurrence ratio – the frequency with which the matching DNA characteristics are likely to be found in the population at large. Provided that he has the necessary data, and the statistical expertise, it may be appropriate for him then to say how many people with the matching characteristics are likely to be found in the United Kingdom – or perhaps in a more limited relevant sub-group, such as, for instance, the Caucasian sexually active males in the Manchester area. This will often be limited to the evidence which he can properly

> and usefully give. It will then be for the Jury to decide, having regard to all the relevant evidence, whether they are sure that it was the Defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.

The first part of the passage just referred to can safely be ignored as there is no pre-trial review in Malaysia. The second part of the passage, in particular, evidence of the nature of the match and the random occurrence ratio which will constitute the reasons for the conclusion arrived at by the DNA expert accords with s. 51 of the Evidence Act 1950 which reads as follows:

> Whenever the opinion of any living person is relevant, the grounds on which is opinion is based are also relevant.

A bare expression of a witness's opinion has no evidentiary value at all. As Brown Ag CJ said in *Sim Ah Song v. R* [1951] MLJ 150 at p. 151:

> The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court.

In *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 it was observed by the (then) Supreme Court that it is a serious misdirection to rely on the evidence of a handwriting expert unsupported by cogent data showing the process by which he came to his conclusion. Thus it is clear that an expert must give reasons for his conclusion.

In the case of DNA evidence it is the number of matches and their DNA characteristics that will explain the relationship between the samples analysed. The number of matches will also facilitate a calculation of the random occurrence ratio. These will constitute the reasons for the conclusion arrived at by the chemist. PW20 merely gave evidence that the result of his analysis is that the DNA profile of Specimen C labelled Loo Seng Yip obtained matched with the DNA profile developed from the blood stains on A4 thereby showing that the DNA identified were consistent with having originated from the same source. He did not explain the nature of the DNA characteristics and the number of matches that were similar. Neither did he explain his finding that the probability of a randomly selected unrelated individuals having this matching DNA profile is approximately one in 14 billion as calculated based

on the Malaysian Chinese population data base. PW20 has therefore given evidence only of his conclusions without adverting to the reasons that led to such a conclusion. The fact that the required evidence is in the chemist report makes no difference to his evidence. As PW20 has given oral evidence his report is only of corroborative value (see *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170). It cannot supplement his oral evidence. It is settled law that the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *Director of Public Prosecutions v. Hester* [1973] AC 296). Thus evidence tendered to corroborate the testimony of a witness can only be used for that purpose and not as a substitute of the substantive evidence itself. PW20's evidence is therefore of no evidential value.

The next matter that warrants consideration is the admissibility of the cautioned statement made by the accused. A trial within a trial was held for that purpose. The prosecution called a total of seven witnesses while the defence called three. Assistant Superintendent of Police Wan Kok Chai (PW23) was the first prosecution witness. He recorded the cautioned statement from the accused on the request of PW26. The accused was brought to him by Lance Corporal Hairuddin bin Maslan (TW2). He started recording the statement at 11.30 a.m. and finished at 2.05 p.m. The accused was normal and did not have any injuries on him. He administered the caution on the accused and explained it to him. He did not threaten or induce the accused to give the statement. After recording the statement he read it back to the accused who confirmed that what is recorded is what he had stated. In his cross-examination PW23 said he did not know for how long prior to recording the statement the accused was in remand. He then said:

> I do not know whether when I recorded the statement it was the 6th day of the arrest of accused. I do not know whether he was taken out for interrogation on a daily basis. It is not true that he had refused to give a statement prior to giving me the statement. When I asked him whether he wanted to give a statement he was co-operative. I did not ask him whether some other officers wanted to record his statement.

In further cross-examination he said:

> On 9.1.2001 the accused was brought to my office for his statement to be recorded. It is not true that after I cautioned him he said he did not want to give a statement and that when I asked him why he said he wanted his counsel. I deny that after that he was taken back to the lockup. I deny that half an hour later I went to the lockup to see the accused. I deny that I then insisted that he

must give a statement. I deny that I told him that if he did not give a statement it would be difficult for him and me. It is not true that thereafter I went to my office. I deny that a short while later I sent somebody to take the accused up. I deny that I then recorded his statement without cautioning him.

TW2 said that on 9 January 2001 PW23 instructed him to bring the accused to his office. PW26 (TW3) said that the accused was handed to him on the morning of 4 January 2001. The accused had some injuries on his right calf. He then said:

At 3.05 p.m. on 4.1.2001 I did the initial investigation. On 5.1.2001 at 11.05 a.m. I brought him out to continue my investigation. During the investigation the OKT revealed some information regarding the belongings of the deceased. At 11.15 a.m. I lodged a police report. At 12.30 p.m. I with a police team went to look for exhibits. I did not force the accused to make any statement. For the duration of the remand of the accused he was given sufficient food and drinks. My men or I did not beat the accused. I did not any time force or induce the accused to give a statement. I did not make any promises to him to make a statement. I did not subject him to any threat. Apart from me and Insp Sivakumar nobody else had access to the accused. Insp Sivakumar had access as he is the operations officer in our unit.

In his cross-examination he said:

I could not have taken his statement on the 4th as the things revealed by the accused were not complete. The accused was taken out from the lockup on a daily basis. Every day he was taken out to be questioned. I have a Chinese superior officer. He is ASP Wan. After I had brought the accused to recover some exhibits I asked ASP Wan to record his statement. I wanted to have a complete picture first before I take a statement. I do not know whether the accused was assaulted on the first day of his arrest by Insp Siva. The accused was interrogated on the 4th to the 8th. I interrogated him. Insp Siva assisted me. He did not interrogate the accused in my absence. Only my OC and I can take the accused out of the lockup.

Chief Inspector Sivakumar (TW4) said that on 4 January 2001 when he arrested the accused he sent him to the lockup at 6am. He said in his cross-examination:

Kumpulan saya ada 3 orang Cina. Nama penuhnya ialah Seow Kok Meng, Tan Boon Chuan dan Goh saya kurang pasti. Mereka berpangkat Detektif L/Kpl. Pada hari tangkapan mereka tidak pakai uniform. Saya menolong C/Insp Koh untuk buat soalsiasat. Saya tak bawa OKT keluar dari lockup. Mungkin C/Insp Koh. Pada 4.1.2001 saya tidak menampar (slap) OKT. Saya tidak setuju di antara Seow,

Tan dan Goh dua orang ada pukul OKT. Saya tidak setuju mata OKT ditutup. Saya tidak setuju kita pukul OKT dengan rubber hose. Saya tidak soalsiasat OKT untuk lima hari berterusan. Saya soalsiasat satu hari sahaja. Saya tidak tahu sama ada OKT disoalsiasat di hadapan Supt Takbir atau DSP Azizan.

Detective Corporal Seow Kok Meng (TW5), Detective Corporal Tan Boon Chuan (TW6) and Detective Lance Corporal Goh Swan Wah (TW7) were part of the police party which arrested the accused. They deny that they assaulted the accused. In his evidence the accused said that after his arrest he was assaulted by PW4 and some others. As he further said:

During the interrogation my hands were handcuffed at the back. When I answered no I was slapped by Sivakumar. Insp Sivakumar identified. This went on for 1 to 1 1/2 hours. I can identify the two policemen who assaulted me – Goh and Seow identified. One punched me on the chest and another slapped me. (Witness identifies Seow as the person who punched him) I was slapped as I said no to the questions asked. On the 4th I was not blindfolded. I was interrogated on a few times. I cannot remember the dates. Between the 4th to the 9th I was interrogated. I was taken out everyday but not every day for interrogation. On these days when I was questioned I was assaulted. I am not sure by whom as I was blindfolded.

On the 9th January I was taken to ASP Wan Kok Chai's room. When I arrived there ASP Wan told me that my statement will be taken. He told me that I have a choice whether to give a statement or not. I told him I did not want to give any statement. He asked why. I said I had no counsel. I was then taken back to the lockup. Before I was taken back I was in his room for more than an hour. ASP Wan then visited me in the lockup within half an hour. ASP Wan told me that it is better for me to give a statement. Otherwise it would be difficult for him and me. He said if I refused to give a statement then I will be suffering. He was in the lockup for 5 – 10 minutes. When ASP Wan visited me there was another prisoner with me called Suresh s/o Ayaru. Suresh was in the same lockup as me on the 9th of January. After the visit by ASP Wan I was taken out of the lockup. ASP Wan identified. I was taken to ASP Wan's office. I cannot remember who took me out. On this occasion ASP Wan did not caution me. ASP Wan told me that he knew about my case and that he wanted to record my statement. He did not read back the statement to me.

I was arrested on 4th January. On that day I was kept in the lockup with one Chong Hon Loong (SP6). I have known him for 2 – 3 years.

I was assaulted 4.1.2001. After I was assaulted I was taken back to the lockup. I told Chong Hon Loong about the incident. I told him where I was assaulted. I showed him my back. This was on 4.1.2001. On 5.1.2001 Chong Hon Loong was with me in the morning. After the afternoon he was no longer there.

In cross-examination he said:

> In ASP Wan's office I did not give a statement on the first occasion. It was in the morning. I was escorted back to the lockup. Half an hour later ASP Wan visited me in the lockup. He told me that it is better for me to give statement and that it would be good for him and me. He did not tell me this in his office. I deny that this did not happen. I deny that ASP Wan never visited me in the lockup. I deny that when I was brought to ASP Wan's office at 11.15 a.m. I gave a statement voluntarily. I deny that on the second time I was not cautioned and that it was on that occasion I gave the statement.
>
> I did not want to give a statement the first time as I did not have a lawyer. I know from the TV that I have a right to a lawyer. I deny that I was taken to ASP Wan only once and that I gave a cautioned statement voluntarily. I deny that I was not assaulted by Sivakumar and the two Chinese officers.

In further cross-examination he said:

> Yesterday I did not mention about Suresh as I was not asked. I confirm that it actually happened. I deny that I never told Suresh. On the second time I gave a statement as ASP Wan told me that if I refused to give a statement he and I will be in trouble. I gave the statement for my sake as I was worried that I would be beaten up again. I deny that I gave the statement voluntarily.

Chong Hon Loong (DTW2) said in his examination-in-chief:

> On 28.12.2000 I was arrested by the police. I was detained till 5.1.2001. On 4.1.2001 I took a team of police officers to a kindergarten in Sg Long. Before I took them there I took them to Blue Boy Mansion. I took them there as they wanted me to show them the accused's house. He was not there. Then I took them to the kindergarten. On the way someone punched me twice in the chest. The accused was arrested. I do not know the time. It was in the early hours of the morning. Then the accused and I were taken back to the police station in separate cars. When I arrived at the police station the accused was seated there in a room. I was taken back to the lockup. When I was taken to the lockup there were people shouting, scolding and the sound of banging tables. Then I heard the accused screaming. It was about 3.00 – 4.00 a.m. and quiet. When I saw the accused in the room there were two police officers with him. Suddenly, the noise stopped. The accused was placed in the same lockup as me. He was brought to the lockup after about one hour. The accused told me he was beaten. He said it was at the back and the front chest. I saw bruises. (Goh shown to witness) This is the person who punched me.

In cross-examination he said:

> I was taken to the lockup. I had seen the accused with two police officers. I heard a loud noise, shouting in Malay saying, 'Co-operate with us. Don't lie.' I cannot recognise the voice. The noise came from about 4 – 5 rooms away. May be 10 – 15 metres away. I only heard the commotion. I did not see anything. It was the accused who screamed. I only heard his scream. It is hard to say that accused wanted to hurt himself. The accused was brought to the lockup about one hour later. There was no light in the lockup. But outside there was. The lockup was not dark. The accused told me he was beaten outside by the police officers. He showed me his back and chest and I saw bruises. It can be seen easily as we are not allowed to wear anything except our underwear. I do not agree that the accused was not assaulted. I deny that there were no bruises on him. I deny that I am saying all these as accused and I used to be good friends.

Suresh a/l Ayaru (DTW3) said in his examination-in-chief:

> In January 2001 I was arrested by the police. It was on 6.1.2001. I recognise the accused. I was detained in IPK D9 for 14 days. On 9.1.2001 the accused was in the same lockup as me. On that morning the accused was taken out twice. On the first occasion he came back after about half an hour. He spoke to me. OKT berkata pada saya bahawa menyuruh saya mengaku kesalahan saya untuk kebaikan saya. Polis kata kalau OKT tidak mengaku dia akan mendatangkan masalah. About one hour later he left again. Before the accused left the second time somebody visited him. I can recognise him. I can recognise him as he is the person who arrested me. That person was with the accused for 10 – 15 minutes. Immediately after talking to the accused that person took the accused away. That person took the accused away himself. That person came after the accused was in the lockup for about an hour. When the accused came back after the second time he told me that he had admitted to the offence.

In cross-examination he said:

> I was detained for 14 days from 6.1.2001 for an offence of murder. Saya telah dituduh. Saya telah disabitkan. Alamat saya ialah Penjara Kajang. The fourth day of my detention is 9.1.2001. On that day the accused was taken out twice. I do not know the time he was first taken out but it was in the morning. I deny that accused did not tell me anything. The person who came to see accused is a Chinese with short hair. He is the person who took the accused out for the second time.
>
> I was not that close to the accused. He told me that he had admitted to the offence. I know whom the accused met when he was taken out the first time. He is a Chinese and is outside the Court now. I do not know his name. I saw him outside the Court. I deny that the accused was not taken out on two occasions. I deny that nobody visited the accused. I deny that my evidence is not true.

In the course of the submissions at the end of the trial within a trial the learned Deputy Public Prosecutor conceded that no evidence had been adduced by the prosecution as to what happened to the accused from the 6th to the 8th. Accordingly, she applied to recall the investigation officer to fill the gap. Learned counsel objected to the application as the defence had already closed its case. In my opinion the evidence that the prosecution was seeking to adduce is not of a technical and formal nature. It is substantive. The prosecution ought to have been aware that such evidence is a vital part of its case in a trial within a trial. It was within the means of the prosecution at the stage of its case to have had it adduced in evidence and is not something that has arisen unexpectedly. Accordingly the case for the prosecution cannot be allowed to be split on the principles that I have discussed in *PP v. Chia Leong Foo* [2000] 6 MLJ 705. Therefore I disallowed the application. The result is that there is a gap in the prosecution evidence as to what happened to the accused during a certain period when he was in custody prior to making the cautioned statement. This has not been looked upon favourably in cases such as *PP v. Tan Boon Tat* [1990] 2 MLJ 466 and *Lim Sing Hiaw v. PP* [1965] 1 MLJ 85. In any event I was satisfied that the accused has raised a doubt as to whether he gave the statement voluntarily. The evidence of the accused that he was assaulted after his arrest is supported by the evidence of DTW2. He said that when he was taken to the lockup he saw the accused seated in the police station. He heard the sound of people shouting and scolding. Then he heard the accused screaming. When the accused was brought to the lockup he told DTW2 that he was beaten. DTW2 saw bruises on the accused. Quite contrary to the evidence of PW23 DTW3 supported the evidence of the accused when he said that the accused was taken out from the lockup twice on 9 January 2001. When the accused came back the first time he told DTW3 that the police had told him to admit to the offence. When the accused came back after the second time he told DTW3 that he had admitted to the offence. When the accused was recalled he said that he gave the statement as he was worried that if he did not do so he will be in trouble and will suffer more. In the circumstances I ruled that the cautioned statement was not voluntarily made and ruled that it is not admissible.

With my ruling on the DNA evidence against the accused and my rejection of the cautioned statement made by him there is no evidence to connect him to the killing of the deceased. Even if I were to give due weight to the DNA evidence it only means that the accused was near the scene. That does not connect him to the offence in the absence of other incriminating evidence. The throwing away of the clothes by the accused and the injury on his leg

do not, on their own, establish anything. Chong Hon Loong (PW6) testified on his homosexual activities with the accused. He introduced the accused to the deceased. On the night of 27 December 2000 he went out with the accused. Later in the night the accused took PW6's car and left. PW6 then went to the deceased's house with some friends. He saw a body lying outside the lift. Several medical officers were called to testify on the injury that the accused had sustained on his leg. The evidence of these witnesses do not connect the accused to the crime with which he has been charged.

In the upshot I was satisfied that the prosecution had not made out a *prima facie* case against the accused, and, accordingly acquitted and discharged him without calling upon him to enter his defence.